No. 21-5649

IN THE

Supreme Court of the United States

JAVON PIERRE SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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The three steps of a *Batson* analysis are well-established and undisputed. Pet. 2-3, 6-7; BIO 5-6. At issue here is how to apply those steps in the common situation where a prosecutor strikes multiple members of the same racial or ethnic group. In particular, the question presented is whether, when a trial court denies a *Batson* motion at step one and then, in response to a second *Batson* motion as to a subsequently struck juror, the prosecutor gives reasons for striking both jurors at step two, the trial court must make a step-three finding as to the first juror. Pet. ii.

1. The government claims that "*Batson* itself" cautions against the Court formulating "particular procedures" for responding to peremptory-strike objections. BIO 10 (citing *Batson v. Kentucky*, 476 U.S. 79, 99 (1986)). "In the decades since *Batson*," however, "this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). In those cases, the Court has established guidelines for applying *Batson*. It is necessary and appropriate for the Court to do so again.

2. Although the Court has not yet confronted the exact question presented here, its precedent compels the conclusion that a step-three finding is required for each juror once a prosecutor proffers reasons for striking two or more jurors of the same race or ethnicity, even if he does so in response to a *Batson* motion made when he exercised a peremptory challenge against the last such juror. Pet. 6-9. To argue the contrary, the government mostly repeats the Ninth Circuit's cursory analysis, and

its mistakes. Considering the petitioner's first *Batson* motion in isolation, the government concludes that he failed at step one as to that Latino juror. BIO 6-7. Then, considering the second *Batson* motion separately, the government contends that the petitioner failed to meet his burden at step three as to the other Latino juror. BIO 7-8. Dismissing the reason proffered for striking the first juror when responding to the second *Batson* motion as "'superfluous[,]'" the government claims that the district court had no obligation to evaluate whether that reason was a pretext for discrimination. BIO 8 (quoting App. 5a). The Court should grant review to clarify that courts cannot engage in such a divide-and-conquer approach when applying *Batson*. *See* Pet. 17-18.

3. Whether a prosecutor was motivated in substantial part by discriminatory intent when striking one juror of a particular race is extremely relevant to whether he improperly struck other jurors of the same race, so a step-three analysis as to any one of those jurors necessarily requires a step-three analysis as to the others. Pet. 8. The Court has "'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, *all* of the circumstances that bear upon the issue of racial animosity *must* be consulted.'" *Foster v. Chatman*, 578 U.S. 488, 501 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)) (emphasis added). In particular, when there are multiple disputed strikes, a court should consider each strike "for the bearing it might have upon the strike[s]" of the others. *Snyder*, 552 U.S. at 478; Pet. 8. It cannot consider each "strike in isolation."

Flowers, 139 S. Ct. at 2250. Indeed, focusing entirely on only the last in a series of allegedly-discriminatory strikes, and disregarding the others, is like trying to decide whether a serial killer intended to murder his last victim without taking the others into account. *See generally* Fed. R. Evid. 404(b) (evidence of other crime, wrong, or act admissible to prove intent). Thus, without evaluating whether prior strikes were the result of purposeful discrimination, a court cannot reach a valid step-three finding as to the last strike, which requires a "sensitive inquiry into such circumstantial evidence of intent as may be available." *Foster*, 578 U.S. at 501 (quotation marks and ellipses omitted).

This case illustrates why that is true. The government does not dispute that the strike of the first Latino juror (M.V.) cannot withstand a step-three analysis given that the record refutes the proffered reason for it (that he was purportedly "disengaged"), that the same vague trait was suspiciously invoked to justify striking both Latino jurors, and that the racial dynamics in the case provided a motive for discrimination. Pet. 13-17. The Court can therefore conclude, or at least assume for purposes of this petition, that the government was motivated in substantial part by discriminatory intent in making that strike. *See Snyder*, 552 U.S. at 485 (proffer of even one pretextual reason "naturally gives rise to an inference of discriminatory intent."). That fact bears heavily on whether the government also struck the second Latino juror with the same intent, particularly given that the government gave the same reason for both strikes. *See* ER 22. The Ninth Circuit's holding that the

district "court was not obligated to revisit the [first] strike" after the government proffered that reason (App. 5a) sanctioned the district court ignoring the kind of relevant racial-animosity evidence it was *required* to consider in its step-three analysis for the second strike. *See Foster*, 578 U.S. at 501.[1]

4. The government notes an absence of authority on whether the general rule that a court "must" undertake a step-three analysis where the prosecutor has offered a race-neutral justification at step two (*see* Pet. 8-9) applies where the defendant has not established a prima facie case at step one. BIO 9. Any lack of precedent on that issue supports the Court granting review in this case to provide needed guidance, as it has in a similar context. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (once prosecutor has offered a race-neutral explanation for peremptory challenges, preliminary issue of whether defendant had made prima facie showing becomes moot, at least where trial court ruled on ultimate question of intentional discrimination); Pet. 9. But even assuming that a trial court that skips step one and reaches step two does not have the duty to proceed to step three in a *single-strike* case, cases involving *a pattern of strikes* are significantly different for

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[1] The government observes that a district court's step-three finding is reviewed for clear error. BIO 6. That standard of review simply does not apply when a district court never made such a finding, as with the first Latino juror (M.V.) in this case. And to the extent the step-three finding as to the second Latino juror (E.M.) failed to consider M.V. at all, it was clearly erroneous for the reasons discussed above.

the reasons given above—whether prior strikes were racially motivated is a necessary part of the inquiry into whether the last disputed strike was too.

5. Aside from the relevance of prior strikes to the step-three analysis of the final strike in a pattern, there is another reason to reject the position of the government and the Ninth Circuit that a trial court is "'not obligated to revisit'" a prior strike that failed at step one when a pattern later appears. BIO 8 (quoting App. 5a). Once there is a pattern of strikes amounting to a prima facie case, that prima facie case logically extends to *all* of the strikes in the pattern, not just the last one. In other words, the defendant has satisfied step one for all those strikes at that point, so when the government proffers reasons for all the strikes, the rule that the trial court must go on to step three applies to all the strikes. *See* Pet. 8-9. The duty to make a step-three finding for the prior jurors is especially important where, as here, the defendant invoked the pattern of strikes as a basis for the final *Batson* motion, effectively claiming a prima facie case that the prosecutor was exercising *all* of those peremptory challenges with discriminatory intent. *See* ER 22. The government nonetheless claims that "it would make little sense to require a court to evaluate a *Batson* challenge at step three when the court has already found that the defendant cannot even establish a prima facie case of discrimination." BIO 9-10. After the pattern (and a prima facie case) appears, however, that makes perfect sense.

6. The government claims that where "a prosecutor provides a race-neutral explanation for the second strike demonstrating it was not part of *a pattern of racial discrimination*[,]" it follows that "[i]f such a pattern does not exist after the second strike, it necessarily also did not exist after the first." BIO 9 (emphasis added). As used in the petition, however, "pattern" refers to the objective fact that a prosecutor has exercised peremptory challenges against multiple members of the same race or ethnicity. Pet. 5, 8-10, 13. That is generally how the Court uses the term too, as it has noted that such a pattern "'might give rise to an inference of discrimination.'" *Flowers*, 139 S. Ct. at 2246 (quoting *Batson*, 476 U.S. at 97). The government does not, and cannot, contest that, in this case, there was such a pattern—multiple strikes of jurors of the same ethnicity. Recharacterizing the relevant pattern as one of "racial discrimination" conflates the *objective fact* relevant at step one and step three with the ultimate step-three finding itself.

Even taking that mischaracterization at face value, the government's pattern-of-racial-discrimination point makes sense only if a district court actually considered whether the reasons for each strike could withstand step-three scrutiny in ruling on whether the prosecutor's race-neutral explanation for the final strike was his real reason and not a pretext for purposeful discrimination. *See* Pet. 13-14. Again, that did not happen here.

7. The government complains that "it may be difficult or impossible to revisit or undo a prior strike against a juror who has already been excused[.]" BIO 10. But

appellate courts "revisit" prior strikes all the time to apply step three based on the existing record. Because the inquiry focuses on what the prosecutor knew at the time he exercised the strike, the juror does not need to be available for further questioning. Nor will there ever be a need to "undo" a prior strike. At issue is a district court's step-three analysis for a *Batson* motion made after a pattern of strikes against jurors of the same race. As discussed above, that necessarily entails an inquiry into whether any of those strikes were made with discriminatory intent. If, after that inquiry, the district court finds that prior strikes violated *Batson*, the remedy is a mistrial. *See Flowers*, 139 S. Ct. at 2241 ("In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many."). To hold otherwise would mean that a prosecutor caught striking multiple jurors of the same race with discriminatory intent nevertheless reaps the benefit of that unconstitutional conduct simply because that pattern was not evident at the beginning such that the trial court did not get past step one of *Batson* until more jurors were struck.

8. As previously explained, the Ninth Circuit rejected the petitioner's *Batson* claim based on its problematic opinion in *United States v. Guerrero*, 595 F.3d 1059 (9th Cir. 2010). Pet. 11-12. The government discusses that case only in footnote. BIO 9-10 n.*. In doing so, it fails to acknowledge the dissent. *See Guerrero*, 595 F.3d at 1067 (Gould, CJ, dissenting) ("While the majority assures us that its decision is consistent with [the rule that once the *Batson* process reaches step two,

the district court must then go on to step three], it does not explain how. To state my perspective simply: The district court went to step two by inquiring after the prosecutor's reasons for the strike, but having done so, the district court did not correctly follow through by making a finding at step three as to whether there was or was not purposeful discrimination. As applied here, in my view our precedent required that the trial court also reach step three."). Furthermore, the government did not acknowledge the petitioner's point that *Guerrero* (a single-strike case) should not be applied to the present situation, where the district court did reach step three, albeit only as to the second of two challenged strikes. *See* Pet. 12.

9. Contrary to what the government claims, the petitioner does not seek review of a "fact-bound" issue. BIO 10-11. His petition presents a legal question concerning how to apply *Batson* in the common situation where a prosecutor strikes multiple jurors of the same race or ethnicity. The Ninth Circuit held that where a pattern of such strikes satisfies step one and the prosecutor gives reasons for all the strikes at step two, whether the prior strikes were exercised with discriminatory intent is irrelevant because the trial court must only conduct a step-three analysis for the final strike in isolation. App. 5a-6a. That ruling conflicts with this Court's precedent, and to the extent the Court has not yet specifically addressed this important federal question, it should grant review to do so now. *See* Sup. Ct. R. 10(c).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition.

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Respectfully submitted,

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